TAN SRI DATO' ERIC CHIA ENG HOCK

v.

NKK CORPORATION (JAPAN)

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-23-73-2002]
21 MAY 2004

LIMITATION: *Striking out - Striking out writ on ground of time bar - When time began to run – Whether from date of publication of defamatory statement - Canadian principle of discoverability - Element of knowledge on part of person defamed - Whether exists such reference in s. 6 of the Malaysian Limitation Act 1953 - Whether accepted by court - Whether plaintiff's action time-barred - Limitation Act 1953, s. 6(1)(a)*

This was the plaintiff's appeal against the decision of the senior assistant registrar who had allowed the defendant's interlocutory application pursuant to O. 18 r. 19(1)(b) and/or (c) of the Rules of the High Court 1980 to strike out the plaintiff's statement of claim and subsequently dismissed the suit. The plaintiff was a well known businessman in Malaysia and was the managing director of the Perwaja Group of companies ("Perwaja"). The plaintiff filed a defamation suit against the defendant, a well known steel manufacturing company incorporated in Japan ('NKK') on the basis of a letter dated 11 October 1995. In the said letter written by the defendant, it was averred that the plaintiff was involved in a gigantic fraud to cheat Perwaja and had conspired with persons unconnected with the three technical assistance agreements entered between Perwaja and NKK in order to siphon money. In the present appeal, it was the plaintiff's contention that the letter of 11 October 1995 came to his knowledge only a year later, on 9 October 1996. The defendant however argued that since the writ was filed only on 2 October 2002, that the plaintiff's action is therefore time barred by reason of s. 6(1)(a) of the Limitation Act 1953.

Held (for the defendant):

[1] In a defamation action, for the purpose of calculating the six year limitation period as stipulated by s. 6(1)(a) of the Limitation Act 1953, time began to run from the date (11 October 1995) of the publication of the defamatory statement to a third party; and not from the date (9 October 1996) when the plaintiff first had knowledge of the alleged defamatory words. (p 142 b)

[2] The court could not accept the Canadian principle of discoverability into our law of limitation in respect of the tort of defamation. The provisions of the Canadian legislation relating to limitation on libel and slander are different from s. 6 of our Limition Act. In the provisions of Canadian law, there are references to the element of knowledge on the part of the person defamed. Significantly, there is no such reference in s. 6 of the Malaysian Limitation Act. (pp 143 h & 144 d)

[Plaintiff's appeal dismissed with costs.]

Case(s) referred to:

Bhaduria v. Persaud [1980] 40 OR (3d) 140 ***(refd)***

Government of Malaysia v. Lim Kit Siang [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Hock Hua Bank Ltd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] 1 CLJ (Rep) 126 SC ***(refd)***

Ismail Ibrahim v. Lim, Lim & Ors [1997] 276 MLJU 1 ***(refd)***

James v. Stonehocker [2002] ACWSJ 6872 ***(refd)***

Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC ***(refd)***

Ronex Properties Ltd v. John Laing Construction Ltd & Ors [1982] 3 All ER 961 ***(refd)***

S Balasundram Subramaniam v. B Balakumar Balasundram & Anor [2000] MLJU 193 ***(refd)***

Tan Yang Chai v. Kandang Kerbau Hospital Pte Ltd [1997] 3 SLR 399 ***(refd)***

Zainuddin Dato' Seri Paduka Hj Marsal v. Pengiran Putera Negara Pengiran Hj Umar [1997] 4 MLJ 135 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6(1)(a)

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c)

Libel and Slander Act [Canada], s. 5(1)

Other source(s) referred to:

Choong Yeow Choy, Law of Limitation, 1995 Butterworths, p 64

David Price, *Defamation Law, Procedure & Practice*, 2nd edn, Sweet & Maxwell, pp 139-140

Gatley on Libel and Slander, 9th edn, Sweet & Maxwell, 1998, para 18.26

For the plaintiff - T Jegadeesan; M/s Jega Kumar & Partners

For the defendant - Cecil Abraham (Rishwant Singh); M/s Shearn Delamore & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Hishamudin Yunus J:

This is an appeal by the plaintiff against the decision of the learned senior assistant registrar who had allowed the defendant's interlocutory application pursuant to O. 18 r. 19(1)(b) and/or (c) (that the suit is scandalous, frivolous or vexatious and/or otherwise an abuse of court process) of the Rules of the High Court 1980 to strike out the plaintiff's statement of claim and dismiss the suit.

The plaintiff is a well known businessman in Malaysia. He was until 31 August 1995 the managing director of the Perwaja Group of companies (after this shall be referred to as "Perwaja").

The defendant is a well-known steel manufacturing company incorporated in Japan. The defendant now trades under the name of JFE Engineering Corporation, having undergone a change of name on 1 April 2003.

In the present case, the plaintiff filed a defamation suit against the defendant on the basis of a letter dated 11 October 1995 written by the defendant. The plaintiff's writ was filed on 2 October 2002.

The material parts of the averments in the statement of claim reads as follows:

> 21. On or about the 9th day of October 1996, the Plaintiff's attention was brought to a letter dated 11th day of October, 1995, written by N. Otani as the servant and or agent of the Defendants by the Anti-Corruption Agency of Malaysia (ACA), which was addressed to Dr. Akram Che Ayub of Perwaja Steel Sdn Bhd (PSSB). The letter contained the following allegations:
>
> > (i) NKK Corporation (the Defendants) never asked for any payment from Perwaja under the TAA.
> >
> > (ii) That he (N. Otani) did not issue on behalf of NKK Corporation (the Defendants) the letter dated 17th day of February, 1994 to PRMD requesting for the remittance of the TAA fees and
> >
> > (iii) The signature on the NKK Corporation's letter dated 17th day of February 1994 was not his (N. Otani).
>
> 22. Based on N. Otani's letter dated 11th day of October, 1995, which was written as an agent or servant of the Defendants, the Plaintiff was investigated thoroughly by both the Police and the Anti-Corruption Agency (ACA) of Malaysia.

23. The statement contained in the letter in its totality with emphasis given to the passages aforesaid in their proper context, both cumulatively and separately and within the Publications as a whole:

(a) refers to and are directed at the Plaintiff;

(b) is untrue;

(c) were at the time of the said publication/report calculated to disparage the Plaintiff in his office, and/or calling, and in so far as section 5 of the Defamation Act 1957 was concerned, resulted in prejudice and special damages to the Plaintiff; and finally

(d) is defamatory of the Plaintiff.

24. By the said words in the report as a whole, the Defendant meant, and were understood to mean, that the Plaintiff:

(a) Has had wrongfully made payment to a company which has no connection whatsoever with the Three (3) Technical Assistance Agreements entered between Perwaja Steel Sdn Bhd and NKK Corporation of Japan and that Plaintiff was a party "involved in a gigantic fraud to cheat Perwaja".

(b) Was dishonest and had conspired with persons unconnected with the Three Technical Assistance Agreements in order to siphon the sum of Yen 2,891,580,000.00 or its equivalent of RM76.4 Million from PRMD.

The defendant, on the other hand, in its statement of defence, pleads, *inter alia*, the defence of time limitation and invokes s. 6(1)(a) of the Limitation Act 1953.

Section 6(1)(a) of the Limitation Act provides:

Limitation of actions of contract and tort and certain other actions.

6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(a) actions founded on a contract or on tort;

The defendant's application to strike out the statement of claim pursuant to O. 18 r. 19 was filed on 14 July 2003.

In the present appeal, it is the plaintiff's contention that the letter of 11 October came to his knowledge only a year later, that is, on 9 October 1996 when he was shown the same by one Encik Han Chee Rull, an officer of the Anti-Corruption Agency, while being interviewed in relation to the losses of Perwaja.

The defendant, however, disputes the claim by the plaintiff that he has knowledge of the letter only on 9 October 1996. The defendant further argues that even if the plaintiff has knowledge of the letter only on 9 October 1996, such a fact is irrelevant for the purpose of s. 6(1)(a).

It is the contention of the defendant that since the writ was filed only on 2 October 2002, the plaintiff's action is, therefore, time barred by reason of s. 6(1)(a) of the Limitation Act. The learned counsel for the defendant, Dato' Cecil Abraham, argues that for the purpose of the stipulated six-year period, time began to run from the date of the publication of the letter to a third party, and that occurred on 11 October 1995. Learned counsel submits that by reason of s. 6, limitation sets in on 11 October 2001.

The learned counsel for the defendant submits that since the plaintiff's action is statute barred by reason of the fact that time limitation had set in therefore the plaintiff's action is frivolous, vexatious and an abuse of the process of court.

The plaintiff on the other hand, while accepting that the publication of the letter to a third party took place on 11 October 1995, however, contends that the filing of the action on 2 October 2002 was well within the six-year limitation period as stipulated by s. 6(1)(a). Encik T. Jegadeesan, learned counsel for the plaintiff, argues that for the purpose of s. 6(1)(a) time began to run only from the date the plaintiff had sight of the allegedly offending letter, and that, that date was 9 October 1996.

I have dismissed the plaintiff's appeal with costs. With respect, I accept the defendant's argument. In my judgment, by reason of s. 6(1)(a), the present suit, filed on 2 October 2002, is out of time by a year and is thus frivolous, vexatious and an abuse of the process of the court. In *Ronex Properties Ltd v. John Laing Construction Ltd and Others* [1982] 3 All ER 961, the English Court of Appeal held (at p. 968):

> Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence.

The above decision has been followed by the Brunei High Court in *Zainuddin Dato' Seri Paduka Haji Marsal v. Pengiran Putera Negara Pengiran Haji Umar* [1997] 4 MLJ 135.

I have no doubt whatsoever that the present case is a 'very clear case' (to borrow the phrase in *Ronnex Properties*) of the plaintiff's action being out of time, because the plaintiff unequivocally concedes that the suit was filed seven years after the publication of the allegedly defamatory letter.

I accept the submission of the learned counsel for the defendant that in a defamation action, for the purpose of calculating the six-year limitation period as stipulated by s. 6(1)(a) of the Limitation Act, time began to run from the date (11 October 1995) of the publication of the defamatory statement to a third party; and not from the date (9 October 1996) when the plaintiff first had knowledge of the allegedly defamatory words.

Without any doubt whatsoever, I take this proposition as the correct statement of the law, based on the following authorities. In *Gatley on Libel and Slander*, 9th edn., Sweet & Maxwell, 1998 it is stated (at para. 18.26):

> By section 4A of the Limitation Act 1980 … a claim for libel or slander … must be brought within one year from the date on which the cause of action accrued, that is to say from the date of publication where the words are actionable *per se* …

The learned author of the work *'Defamation Law, Procedure & Practice'*, David Price, 2nd edn., Sweet & Maxwell, states (at p. 139-140):

> The time runs from the date of publication.

The Malaysia Author, Choong Yeow Choy in his book *'Law of Limitation'* 1995 Butterworths, states (at p. 64):

> In an action for libel, the cause of action is complete if the statement is defamatory, refers to the plaintiff and is published. It is trite law that no action for libel will lie unless there has been publication. Therefore in an action for libel time runs from the publication. If a defendant published a defamatory statement which refers to the plaintiff in 1988, the action would be statute-barred if the plaintiff issues the writ in 1995 as more than six years would have elapsed since the date of the publication.

The learned counsel for the plaintiff, on the other hand, in his written submission, has referred to numerous authorities. They are:

(a) *S Balasundram a/l Subramaniam v. B Balakumar a/l Balasundram & Anor* [2000] MLJU 193;

(b) *Loh Holdings Sdn Bhd v. Peglin Development Sdn. Bhd.* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211;

(c) *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126;

(d) *Government of Malaysia v. Lim Kit Siang* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63;

(e) *Tan Yang Chai v. Kandang Kerbau Hospital Pte Ltd* [1997] 3 SLR 399;

(f) *James v. Stonehocker* [2002] ACWSJ 6872

(g) *Ismail bin Ibrahim v. Lim, Lim & Ors* [1997] 276 MLJU 1.

(h) *Bhaduria v. Persaud* [1980] 40 OR (3d) 140.

With respect, I find the above cases clearly irrelevant and I do not propose to discuss any of them, except the Canadian cases of *Bhaduria v. Persaud* and *James v. Stonehocker*. Unlike the others, only these two cases deal directly with the issue of time limitation in respect of the tort of defamation.

In his endeavour to persuade me that time began to run only when the plaintiff first came to know of Mr. Otani's letter, that is, in October 1996, the learned counsel for the plaintiff relies on the 'discoverability' principle as discussed and applied by the Canadian court in *Bhaduria v. Persaud.* Encik Jegadeesan refers to the following passage in the case cited where the Ontario Court (General Division) held:

> For some time now in Canada, there has been a rule applied to many limitation periods, most often tort limitation periods, that the limitation period for an action begins to run at the time when the plaintiff knows or could know the material facts that support the cause of action. This is known as the discoverability principle, and the phrase 'known or could have known', typically used in conjunction with this principle, clearly contains an objective or constructive knowledge component. This principle has been broadly established since the decision of the Supreme Court of Canada in *Central Trust Co. v. Rafuse* [1986] 2 SCR 147 at p. 224, 31 DLR (4th) 481 at p. 535, where Justice Le Dain stated:
>
> > … the judgment of the majority in *Kamloops v. Nielsen* [1984] 2 SCR 2 laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or **ought reasonably to have been discovered by the plaintiff by the exercise of reasonable diligence.** (emphasis added)

With respect, I do not think that it is appropriate for me to import the Canadian principle of discoverability into our law of limitation in respect of the tort of defamation. I take this view because the provisions of the Canadian legislation relating to limitation on libel and slander are different from s. 6 of our Limitation Act. Section 5(1) of the Canadian Libel and Slander Act states:

> 5(1) No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim by delivering it to a grown-up person at the chief office of the defendant.

Section 6 of the same Canadian legislation provides:

> 6. An action for libel in a newspaper or in a broadcast shall be commenced within three months after the libel has come to the knowledge of the person defamed, but, where such an action is brought within that period, the action may include a claim for any other libel against the plaintiff by the defendant in the same newspaper or the same broadcasting station within a period of one year before the commencement of the action.

The ruling made by the Ontario Court in the passage that I have just quoted above was based on these provisions. It is important to observe that in the above provisions of Canadian law there are references to the element of knowledge on the part of the person defamed. Significantly, there is no such reference in s. 6 of the Malaysian Limitation Act.

The decision in *James v. Stonehacker* is that of the Ontario Superior Court of Justice, approving the decision in *Bhaduria v. Persaud*. As it is also a Canadian case, it is irrelevant for the same reason as I have given in respect of *Bhaduria v. Persaud.*

[Appeal dismissed with costs]